CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF LOUISIANA.

EASTERN DISTRICT, JANUARY TERM, 1826.

East'n. District.
January 1826.

FINDLEY
vs.
BREEDLOVE,
BRADFORD &
ROBESON.

FINDLEY vs. *BREEDLOVE, BRADFORD AND ROBESON.*

APPEAL from the court of the first district.

PORTER, J., delivered the opinion of the court. This action was commenced to recover the amount of three several bills of exchange, drawn by the house of William Greene & Co. of Cincinnati, on the defendants, and accepted by them.

These bills appear to have been for the balance due for a steam engine furnished by the drawers, to the present defendants; and, it being admitted that the plaintiff is a partner in the house of William Greene & Co., the same

The party in whom the *legal* title is vested, has the right to sue.

Partnership debts cannot be compensated by a demand against an individual member of the firm.

Damages on the warranty of goods sold, is not confined to the price of them.

When the agent exceeds his authority, the prin-

East'n District. *January* 1826.

FINDLEY *vs.* BREEDLOVE, BRADFORD & ROBESON.

defence has been made, and received without opposition to the payment of these drafts, as could have been offered against the firm who drew them.

This defence consists mainly in an allegation, that there was a failure of consideration for the bills; that the defendants never received value for them; that the engine made by Greene & Co. for the steam-boat Tennessee, was warranted by them to be of good workmanship, but that the same was defective and imperfect, and that the defendants were put to great trouble and expense to repair it.

cipal may set the contract aside, but he cannot enforce it, according to his instructions to the agent.

To this defence against the plaintiff's right of recovery, the defendants, in a supplemental answer, afterwards added a demand in reconvention, grounded on the damages they allege they sustained by the defective engine put on board the boat by the house of Greene & Co.

The judgment of the inferior court was in favor of the plaintiff, and the defendants appealed.

The record comes up loaded with a mass of testimony, taken by the parties in support of their respective allegations: before we can approach it, several important questions of law have to be disposed of.

The first presented by the pleadings is, the plaintiff's right to sue. The answer alleges that Findley gave no valuable consideration for the drafts, and that he is a partner in the house of Greene & Co. This point has been more than once made in this court, and always without success. The person, who on the face of the bill has the legal title to receive its contents, has the right to sue for them. Whether there be, or not, other persons who have an equitable interest to the proceeds, is a question with which the defendant has nothing to do, unless the assignment is made to deprive him of a defence which he would have had against the person who transferred it. In the instance before us, nothing of that kind appears, and the appellants have had the benefit of every objection which they could have made, had the persons from whom the original consideration moved, sued them. See the cases of *Banks* vs. *Eastin*, 3 *Martin, N. S.* 291, *and Shaw & al.* vs. *Thompson, ibid.* 392.

The next comes from the plaintiff, and contests the right of the defendants to plead in reconvention, because the agreement for an engine under which the claim for damages is made, was originally entered into with the de-

East'n. District. *January* 1826.

FINDLEY *vs.* BREEDLOVE, BRADFORD & ROBESON.

fendants, and Robertson & Hill of Nashville. On this head we have been referred to *Toullier, vol.* 7, in the chapter in which he treats of compensation and reconvention. This author lays down the general principle, that debts which are offered in compensation must be personal, and that partnership debts cannot be compensated by demands against an individual member of the firm. This doctrine is recognised by the court as sound, but its application against the defendants, in the present case, we are unable to admit. Supposing the parties here, to be all bound *in solido;* the defendants, and Robertson & Hill, who purchased, and the plaintiffs, who sold; if the defendants now before the court, are selected as those from whom *the whole amount* of the engine is to be paid, they should certainly have the right, in the hypothesis just put, of their being responsible *in solido*, to offer the *whole claim* which belongs to the firm as a defence. This is not pleading private debts against a partnership demand, but partnership debts against partnership claims.

But admitting the responsibility of the defendants to be limited to their virile share, they have the right to set up the same pro-

portion of their interest in the engine in reconvention. Were it otherwise, the plaintiffs, by suing them separately, could totally defeat a right which it is not denied they might exercise collectively.

This brings us to the most important point in the cause. The plaintiff contends that all claims which the defendants had against the house of Greene & Co., in consequence of the defective engine originally put on board the Tennessee steam-boat, were settled finally by the parties in the year 1820.

This is entirely a question of fact, unless the position assumed by one of the plaintiff's counsel be correct; namely, that the warranty of the makers of the engine only extended to replacing those parts which were ascertained to be defective.

The contract for the purchase of the engine, contains an engagement on the part of the makers, "That the engine and all the machinery, necessarily connected therewith, shall be of a good quality; that it shall be executed in a complete workman-like manner; that when completed and put on board, it shall propel a boat as fast as the average of ten of the

East'n. District. *January* 1826.

FINDLEY *vs* BREEDLOVE, BRADFORD & ROBESON.

swiftest running boats which are running on the western waters."

There is nothing in this warranty that limits the responsibility of the sellers to the value of the machinery which should prove defective, and the law extends the obligation much further. Damages are the loss which a person has sustained, or the gain which he has missed: such is the definition of the Roman jurists, "*quantum mea interfuit, id est quantum mihi abest, quantumque lucrari potui.*—*Dig.* 46, *tit* 8, l. 13. In practice, this right is restrained to such injury or damage, as is the direct and immediate consequence of the failure of the contract. The writers on the civil law, illustrate this rule by many examples which it is unnecessary to notice. We think that where the owner of a boat contracts for an engine, and loses the use of her for several months in consequence of defects in the machinery, that the money actually expended, and the loss of gain directly resulting from these defects, come within the definition just given.—*Pothier, Traité des Ob.* 162, 163, 165, *Toullier, Droit Civil Français, Liv.* 3, *tit.* 3, *chap.* 3, *Nos.* 286, 287, *Domat, liv.* 3, *tit.* 5. § 2, *Nos.* 4 & 11, *Civil Code* 49, 50, 51, *p.* 268.

Whether there was not a waiver of these damages by an acceptance of machinery to replace that part which was proved defective, is, as we have already stated, the most important question in the cause; our opinion on it, will be best understood, by stating somewhat in detail, the evidence by which it is contended, this accord and satisfaction, is established.

The most important testimony in support of the plaintiff's pretentions on this point, and that on which the judge below decided the cause, is contained in the deposition of one Anthony Defrées, a clerk of the plaintiff. This witness states, that Breedlove, Bradford & Robeson, owners of the steam-boat Tennessee, sent their engineer Grigg, to Cincinnati, for the purpose of adjusting their claim to damages, for the defective engine originally put on board by Greene & Co. That deponent saw a letter of instruction from the defendants to Grigg, by which they authorised him to claim from Greene & Co., such articles as he conceived to be deficient in the engine, and to receive them in full satisfaction of their claim for damages. That accordingly all the articles required by

East'n. District. *January* 1826.

FINDLEY vs. BREEDLOVE, BRADFORD & ROBESON.

him were furnished, amounting to $1250, and that they were delivered and accepted, on the express agreement, that the same should be in full satisfaction for all claims against Greene & Co. for damages.

Other witnesses testify, that they heard Grigg say he had such a letter as that stated by Defrées, and that he had received the articles mentioned, in full satisfaction of the defendants' claim.

The testimony has been objected to, because the loss of the letter is not sufficiently accounted for, to authorise the introduction of parol evidence.

This objection appears to us, cannot be supported. The writing never was in the possession of the plaintiff; it remained in the hands of the defendants' agent, and diligent search appears to have been made for it among his papers, since his death.

There is much more difficulty in the other ground taken, that the witness has not stated what is true, or that he is mistaken in his recollection of the facts to which he testifies. After due and careful examination of the different proofs which the record exhibits, we feel it impossible to reconcile the witness'

testimony with the written evidence, and that evidence too, introduced by the plaintiff himself.

Giving that testimony, however, credit as far as it goes, until met by the written documents, and supposing it true that Grigg did go up with authority from Breedlove, Bradford & Robeson, to select machinery, and release Greene & Co. from all further responsibility for damages, it is clear to us that they did not conceive him authorised, to make such an agreement, and that if they did, they did not close with his proposals, if any such were made. This we think manifest from the following receipt, taken at the time the articles were delivered:

"Received of Wm. Greene & Co., in good order, the several articles specified in the foregoing bill, for Messrs. Breedlove, Bradford & Robeson, which I engage to deliver to them, the dangers of the river only excepted. Provided they have paid, or shall pay, their acceptances of William Greene & Co's. draft for $1532, due on or about the 28th of September last, and shall pay or give new acceptances at 60 and 90 days, for the amount due on two other acceptances of theirs in favor of

East'n. District. *January* 1826.

FINDLEY *vs.* BREEDLOVE, BRADFORD & ROBESON.

the said William Greene & Co. which have been returned from New-Orleans under protest; a statement of which amount they have been furnished with—provided the articles shall not be received by the above named firm, they are to be deposited with Messrs. Thomas F. Townsley & Co. at New-Orleans.

[Signed,] E. GRIGGS."

Now so far from this receipt supporting the statement of the witness, that these articles were delivered to Grigg, as agent for Breedlove, Bradford & Robeson, and received by him in full satisfaction of their claim against Greene & Co., the very reverse is established by it. It shows that these articles were not received as the property of Breedlove, Bradford & Robeson, but as that of Greene & Co. The person receiving, engages not to deliver them, unless the former accede to certain conditions; and he promises to hand them over to another house in case these conditions are not complied with. It is clear then that neither Greene & Co. nor Grigg, considered any thing settled by the delivery of these articles. The authority of the latter was either not recognised, or if it was, he and Greene & Co. could not agree on the terms. The words

of the receipt establish, that Grigg was constituted by Greene & Co., *their agent*, to make propositions to the defendants, and that if they accept them, he was to deliver the machinery, if not, he was to hand it over to Thomas F. Townsley & Co.

That he acted incautiously, or not in good faith, in delivering the articles in question, without obtaining a compliance of these conditions, on which he was authorised to deliver them, there can be no doubt: what effect the receipt of them should have on the defendants' claim, is the next point to which our attention must be directed.

It is one of no difficulty. When the agent exceeds his authority, and the party dealing with him knows that he does so, the contract is void, and the principal can set it aside; but he cannot claim, it should be enforced according to the instructions given to his attorney in fact, for the assent of the other party is wanting to the agreement.

In the present case, there is no proof that Grigg ever communicated to the defendants the conditions on which he was authorised to deliver the machinery. Admitting the presumption to be that he did, the bringing this

East'n. District. *January* 1826.

FINDLEY vs. BREEDLOVE, BRADFORD & ROBESON.

action on the old bills, is sufficient evidence these conditions were not acceded to.

On the whole, we are satisfied the defendants have not in law, lost their right to set up a claim, which appears to us supported by the strongest equity.

The cause must be remanded in order that the damages be ascertained. 2 *Mar. Dig.* 10.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the cause be remanded for a new trial, and that the appellee pay the costs of the appeal.

Whittelsey for the plaintiff, *M'Caleb* for the defendants.

MORGAN, vs. *FURST & AL.*

APPEAL from the court of the first district.

If property attached, be released on bond, they who give the bond cannot afterwards plead that the

MARTIN, J. delivered the opinion of the court. The plaintiff states, that having levied an attachment, as sheriff, on a quantity of tobacco stems, the defendants obtained the release

of it, on giving bond to hold it, or its proceeds, subject to the judgment of the court; that the plaintiff in the attachment had judgment therefor, and the defendants refuse to deliver the tobacco, or proceeds.

sheriff had no right in the goods.

In whatever way a man appears to bind himself, he is bound.

The answer denies the plaintiff's legal or equitable interest in the tobacco, and consequently his right of action, and avers that the tobacco was the property of Reynolds, and before attached, was purchased from him by Furst, under an agreement that it should be shipped to Hamburg, on the joint account of Furst and Reynolds, and that a part of it was already on board at the time of the attachment; that the amount of the half was $631, of which Furst has paid $306 for storage on the whole, at the request of the plaintiff in the attachment, who knew all this and agreed to the shipment; that by the last accounts the tobacco could not be sold at Hamburg for costs and charges.

There was judgment for the plaintiff, and the defendants appealed.

The statement of facts shows, that the parties agreed, on the tobacco being attached in the suit of Clark *vs.* Oddie, that on Furst

East'n. District. *January* 1826.

MORGAN *vs.* FURST & AL.

giving bond, in the penalty of $957, to abide the decree of the court, the tobacco should be delivered to him.

Oddie having failed, and Clark being appointed his syndic, the latter obtained a rule on Furst, to show cause why he should not be ordered to pay the proceeds of the tobacco to him, for the benefit of the mass. The rule was, no cause being shown, made absolute for the payment of the penalty in the bond.

The property attached was by the final decree of the court in the case of Clark *vs.* Oddie, decreed to be sold for the payment of the creditors, the intervening claimant (Reynolds) under whom the present defendants' claim, having withdrawn his claim.

Devance, a witness for the defendants, deposed that he is Furst's clerk, and heard a conversation between Furst and Reynolds, in which it was agreed that 180 hhds. tobacco stems should be shipped to Hamburgh for their joint account; that after shipping a part of the tobacco, the whole was attached by Clark as Oddie's property, and afterwards Clark and Furst agreed the shipment should go on

according to the agreement, and Furst should give bond for the tobacco at three-fourths of a cent per pound, and account for the proceeds to whoever should be deemed the owner; and accordingly Furst gave his bond for the value of the tobacco, rating it as above, and deducting the storage. At the time of this agreement, the tobacco was in Reynolds' possession, and was delivered to Furst to be shipped, and he was always willing to pay the difference between $631 and 300. He has not yet received an account of sales from Hamburg, and according to the last letters, the tobacco was still on hand. The witness has access to Furst's correspondence, and knows the situation of the tobacco.

On the cross examination, the witness declared he was present at a conversation between Clark and Furst, the particulars of which he does not recollect. He derives his knowledge of the agreement he has stated from Furst; he recollects the former telling the latter not to buy the tobacco, as he, Clark, claimed it. This was after the agreement between Furst and Reynolds. The half of the tobacco at the rate specified, amounted to $631, and Furst paid $300 for storage on

East'n. District. *January* 1826.

MORGAN vs. FURST & AL.

the whole, according to the agreement between Reynolds and Furst, the latter was to take one half of the tobacco at three fourths of a cent per pound, and advanced the value of the other half at the like rate, and accounting for the proceeds.

Reynolds, a witness of the plaintiff, deposed, his agreement with Furst was substantially as stated by the preceding witness. Furst after the shipment, offered to take the whole tobacco on his account, paying for the second half at the same rate, as for the first, the money remaining in the sheriff's hands, subject to the decision of the court. The witness consented to this, and it was accordingly so done.

On the cross examination, this witness declared he did not know Clark, in the agreement made with the defendant. The note given by witness to Spicer, for the tobacco, is still out and unpaid, and the witness has not received any thing for the tobacco.

The counsel for the defendant, urges that the bond sued on, is not one given by the defendant in an attachment case, according to the statute. *Martin's Digest—vide attachments.*

That the defendant had acquired an interest in the property, before the attachment

was laid on it; the bond was therefore taken, on the understanding of the parties, that he should send the property to market, and account for the proceeds, as appears from the condition. To compel the defendant to pay the value, is to force a sale on him.

There is no proof of notice of the judgment to the defendant, neither was he required to bring the proceeds of the property into court.

The plaintiff's counsel urges, that the objection to the form of action, was waived below by the pleadings, and cannot avail here. *Duchamp* vs. *Nicholson*, *vol.* 2. 670.

That the agreement filed in Clark, and Oddie, shows *notice* to Furst of the decree, and puts him *en demeure*, if necessary, which is not the case, as the plaintiff now demands the value or amount of the property, which is the exact amount of the penalty, fixed by the Court at $1200, but reduced by the agreement of the parties, to what Furst's answer shows to be the real debt. *Bryan* vs. *Cox*. *vol.* 3, 575.

That on the merits the testimony of the first witness is of no weight, for he informs us he derives his knowledge from the defendant as hearsay; and Reynolds deposes the latter took the property on his own account; it was

East'n. District. *January*, 1826.

MORGAN vs. FURST & AL.

worth $1262, he had paid $306 for storage, and the balance was $956; for which judgment is prayed.

We think the defendant having given his bond to the sheriff, who delivered him the property attached, cannot urge that the plaintiff has neither legal nor equitable interest. The defendant has given him by his deed, a *legal* right, and the delivery of the goods raises an equity; in whatever mode a party binds himself, he is, by our law, bound.

The defendant cannot avail himself of any right on Reynolds, while he admits the latter withdrew his claim; neither can he urge property in himself, after having bound himself to hold the proceeds to the order of the court.

The proceedings in the case of Clark vs. Oddie, clearly show notice of the decree, and a demand on Furst.

The testimony of Reynolds, establishes Furst's liability for a fixed sum; which he bound himself to pay.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Strawbridge for the plaintiff, *Hoffman* for the defendants.

COPELLE, CURATOR, vs. *DALTON.*

APPEAL from the court of the parish and city of New-Orleans.

MATHEWS, J., delivered the opinion of the court. This suit is brought by the curator of one Whiting's succession, to recover from the defendant, a slave named Bob or Robert, as having been the property of the intestate at the time of his death. The defence as set forth in the answer to the action, is: 1st. Title in the defendant derived from Whiting, through the legal agency of one Cleveland; 2d. Title obtained directly from the latter as being the true equitable proprietor of said slave. The plaintiff obtained judgment in the court below, from which the defendant appealed.

The whole evidence of the case comes up, on the record; from a strict examination of which we are clearly of opinion, that the first ground of defence, relied on by the defendant, entirely fails him. It is manifest that the power of the agent had ceased by the death of his constituent, long before the sale was made to the appellant, and that this occurrence was known to the attorney in fact;

East'n. District. January, 1826.

COPELLE, vs. DALTON.

the defendant could, therefore obtain no title through him in that capacity, as representing Whiting, in whom resided the legal title.

In support of the equitable claim and right of Cleveland, which is alleged to have passed to the purchaser by the act of sale executed by the former, although made under pretence of power derived from the intestate, oral testimony was offered to prove that the price of the slave was paid by Cleveland, and that the act by which the title was conveyed to Whiting, was a simulation to secure the property of the former, against the claims of creditors. This testimony was admitted in the parish court, subject to exceptions in relation to competency. The witness who offered to prove the fact, appears to be the vendor to Whiting; whether he could under any circumstances be admitted to invalidate, or give an entire different effect to his own authentic act, than which that it purports to have, according to the writing itself, it is needless, in the present case to inquire; as we are of opinion, that testimonial proof could not legally be received to prove the pretended simulation of the act of sale to Whiting. The testimony of this witness must be wholly excluded from

the case, and being excluded, leaves the defendant's claim without support. For the correctness of this doctrine—*see vol.* 2, 452. *Ibid.* 13.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Ripley & Conrad for the plaintiff, *M'Caleb* for the defendant.

LAPORTE vs. *LANDRY.*

APPEAL from the court of the second district.

A certificate of protest is not good, unless it states in what post-office the notice was put. A waiver of the want of notice cannot be inferred.

PORTER, J. delivered the opinion of the court.—This is an action against the endorser of a promissory note. The plaintiff was nonsuited in the inferior court, because he failed to give legal evidence of the notice of protest.

The only evidence which the record exhibits of notice, is a certificate on the protest in the following words: "This 4th day of October, I put, myself, at the post-office, a letter notice of the above protest, to Narcisse Landry," signed "Carlier Doutremer, judge and notary public." The judge *a quo*, thought

East'n. District, *January* 1826.

LAPORTE, *vs.* LANDRY.

this insufficient, and we concur with him. Without expressing an opinion on all the objections made to it by defendant's counsel, we think that which is drawn from the omission, to state in what post-office the notice was put, fatal. The statute under which this right of establishing the responsibility of endorsers by the certificate of a notary public is claimed, makes a great change in the rules of evidence, and those who claim the benefit of it, must take care and bring themselves strictly within its provisions.—*Acts of* 1821, 44. *Fougard* vs. *Tourregard, vol.* 3, 464.

A certificate of notice of protest is not good unless it states in what post-office the notice was put.

A waiver of the want of notice cannot be inferred.

The other testimony in the case, does not supply this defect. Doutremer says, that when he applied to the defendant, he refused to renew the note because he wished to force the drawer, Bringier, to pay the same. This, in our opinion, is not sufficient to establish a waiver of notice. The abandonment of the right, acquired by the want of it, should be clearly and unequivocally made out. Chitty

says it must be express, and cannot be *inferred*. *Chitty on bills, ed.* 1821, 309. 5 *Johnson*, 375. 12 *ibid.* 423.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Morphy for the plaintiff, *Conrad* for the defendant.

RICHARDSON vs. *DEBUYS* & *LONGER.*

It is in the discretion of the judge *a quo*, to permit a witness to be sworn after the parties have closed their evidence, and the defendant has opened his case.

He who holds himself out as a partner in a commercial firm is responsible as such, though he is in reality not a member of it.

APPEAL from the court of the first district.

PORTER, J., delivered the opinion of the court. The petition states, that the firm of Debuys & Longer, composed of Gaspard Depuys, A. Longer & Benoit, is indebted to the plaintiff in the sum of $5176, the proceeds of 86 bales of cotton, sold on his account, in the months of November, 1821, and March, 1822.

The defendants severed in their answers.

Debuys & Longer, pleaded that there was no such firm as that set forth in the plaintiff's petition, and denied that Benoit was a partner of it.

That the facts alleged in the petition,

East'n District. January, 1826.

RICHARDSON, vs. DEBUYS & LONGER.

were untrue, and if they should be proved, they owed the plaintiff only, the sum of $131 95 cents.

Benoit's defence consisted in a general denial.

The first points to which our attention has been directed, are presented by bills of exceptions.

On the day the cause stood for trial, the 19th of April, one of the defendants filed an affidavit for a continuance, which stated that on the 21st of March, then last past, he had forwarded a commission to Woodville, in the state of Mississippi, which was not returned. The affidavit contained the usual averments, that the testimony expected under this commission, was material, that it was expected daily, and that the application was not made for delay.

The cause had been at issue three years, when this application was made, and under all the circumstances, we are unable to say the court below acted erroneously, in refusing it. No explanation is furnished, why the defendants delayed so long in procuring testimony, which might have been so easily had at an earlier period.

They renewed the application on another affidavit, that they could not go safely to trial without the benefit of the testimony of Benoit, their co-defendant. But the judge most correctly refused it; for, even admitting the witness was competent, the affidavit neither states that due diligence had been used to procure his attendance; that the application was not made for delay, nor that the defendants expected to get his testimony at any other time. See the cases of *Lafon's, Exrs.* vs. *Gravier & Al. Martin, vol.* 1, 245, and *Allard & Al.* vs. *Lobau, vol.* 3, 295.

The third and last bill of exceptions, was taken to the opinion of the judge, permitting the plaintiff to examine a witness after the parties had closed their evidence, and the defendants' counsel had opened his defence, by reading his answer to the jury. The witness examined, had been summoned, and attached at the instance *of the defendants*, and came into court after the other testimony in the cause had been heard.

We think the judge exercised his discretion soundly in admitting the witness. No general rule can be established in regard to matters of this kind; much must depend on the particular circumstances of the case.

East'n. District. *January* 1826.

RICHARDSON vs. DEBUYS & LONGER.

The principal objections which have occurred to us, against extending such indulgence, is the irregularity and confusion which such a practice creates in the conducting of causes, and the opportunity it affords to one party, to keep back important testimony, until the other, supposing the evidence to be closed, has sent his witnesses away. The first matter must be confided to the judge who tries the cause; and the second is not suggested here, for the witness was one who was summoned by the defendant, and brought into court on his special application. 7 *John.* 306, 4 *Sergeant & Rawle*, 482, 4 *Binney*, 198.

An application was made for a new trial in the inferior court, where, in addition to the reproduction of the grounds taken in the bill of exceptions, it was contended there was no proof of the partnership alleged in the petition. The jury have found this fact in the affirmative, on evidence which is conclusive against Benoit, one of the defendants, but which is rather weak against the others, Debuys & Longer. The former held himself out to the world, as partner, and cannot now be permitted to escape from the responsibility he incurred by the declaration. Under these

circumstances, we are unwilling to disturb the verdict; more particularly as the only persons who can complain of the evidence, not supporting it, are benefitted rather than injured by the finding. If Benoit was not the partner of Debuys, and of Longer, it is surely no injury to them, to see him made responsible *in solido* for their debts.

On the merits, we entirely coincide with the jury; the money paid to Freeman, was paid without proper authority, and the defendants are clearly responsible.

The plaintiff has prayed that the judgment may be amended by adding to the amount found by the jury, $131 95 cents, acknowledged to be due by the answer. And he has contended that as the sum of $1020 78 cents paid Freeman, was the only matter in dispute, and as the verdict is for exactly that sum, it is evident the jury overlooked the admission of the defendants, that the former amount was due, independent of the payment to the person who represented himself as the plaintiff's agent.

We are not certain whether the jury took this admission into consideration or not. They may have believed, that under the

East'n. District. *January* 1826.

RICHARDSON *vs.* DEBUYS & LONGER.

whole circumstances of the case, the plaintiff was entitled to no more. We do not, therefore, feel authorised to give a different sum from that found by them, and the plaintiff has not asked, that the cause should be remanded.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Eustis for the plaintiff, *Carleton* and *Lockett* for the defendants.

RANDALL, vs. *BAYON.*

APPEAL from the court of the second district.

Applications for new trial, are intrusted to the legal discretion of the court below.

PORTER, J., delivered the opinion of the court. The defendant moved for a new trial, on the ground, that during the pendency of the action he was confined on a charge of murder, and was only released the day before trial. The court refused the application, and he appealed.

We are unable to say the judge erred. Applications of this kind are always addressed to the sound legal discretion of the court below. The grounds assumed by the inferior tribu-

nal in refusing this; that the verdict was well supported by the evidence, and that justice was done, is amply sustained by the nature of the claim, the proof adduced, and the suspicion which fairly attaches to a plea in reconvention for matters arising, anterior to the date of the obligation sued on. The statement in the defendant's affidavit, that the cause was tried *ex parte*, is contradicted by the record, which makes express mention, that on the trial, counsel appeared for the defendant, and was heard in his behalf.

As it is however *possible*, the defendant, under other circumstances, might have had the means of supporting his plea in reconvention, we shall reserve him his right to do so.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be anulled, avoided and reversed; and it is further ordered and decreed, that the plaintiff do recover of the defendant, the sum of six hundred and forty four dollars, with interest from judicial demand, and costs in the court below. Those of appeal to be borne by the plaintiff. Reserving, however, to the

East'n District. *January* 1826.

RANDALL *vs.* BAYON.

defendant, all his rights on the matters and things pleaded by him in reconvention.

Conrad for the plaintiff, *Morel* for the defendant.

DAVIS & AL. vs. *TAYLOR,*

APPEAL from the court of the parish and city of New-Orleans.

If A recovers money for the use of B, it cannot be attached as the property of A.

MARTIN, J. delivered the opinion of the court. Two of the plaintiffs had given their respective notes to the defendant, not payable to order or bearer: he assigned them to Arnold, who recovered judgments in suits brought in the name of Taylor, for the use of Arnold. The plaintiffs afterwards attached the amount of these judgments, and obtained an injunction in the present suit. The parish court dismissed the suit and dissolved the injunction, on the attorney (appointed by the court for the defendant) showing that the latter was not in court, no property of his being attached; Arnold having intervened and claimed the right attached as his own, the plaintiffs appealed.

Their counsel contends, that the notes not being negotiable, any defence proven against the payee, is good against the assignee; that assignment vested no right in the assignee, as to third persons, till notice to makers; the suit was improperly dismissed, on a rule on which the merits of the case, could not be gone into.

Arnold's claim does not now rest on the notes; these were merged in the judgment; his claim is *res judicata*. Before judgment, it might have perhaps been objected that the makers had no notice, if the suits themselves were not notice, but it is now too late. In a suit by A. for the use of B. the latter is the real plaintiff, of whom the court and defendant are bound to take notice.

Proceedings in attachment can well be stayed on a rule to show cause by showing the absence of any property of the defendant, under the control of the court. In examining the suggestion, the court does not go into merits, because it does not examine either the claim of the plaintiff, nor the defendant's liability.

It is therefore ordered, adjudged and de-

East'n. District. *January* 1826.

DAVIS & AL. *vs* TAYLOR.

creed, that the judgment of the parish court be affirmed with costs.

Carleton & *Lockett* for the plaintiffs, *McCaleb* & *Byrnes* for the defendant.

LITCHWORTH & AL vs. *BARTELLS & AL.*

APPEAL from the court of the eighth district.

A plat of survey made under the authority of the surveyor general of the former government of Louisiana, is legal evidence in support of title to the land surveyed.

Plaintiff may file a supplemental petition, which does not change the original action.

MATHEWS, J., delivered the opinion of the court. This is an action of tresspass, relating to land, in which the respective titles of the parties are brought into view; their claims appear to have been severely contested in the court below, if we may judge from the number of points made and supported *pro* and *con* and the many bills of exceptions which appear on the record, and on which the case is principally brought before this court. Of these exceptions we deem it necessary to examine only two, being clearly of opinion that the judge *a quo*, erred in rejecting the evidence, which gave rise to one of them taken by the defendants, who are here appellants. The evidence offered is a survey of part of the disputed premises, alleged to have been made,

by and under the authority of the Spanish government, as exercised in the province of Louisiana. The plat or plan is certified by Carlos Trudeau, the surveyor general of said province, as having been executed by one of his deputies. Since the change of government, and opening of the land-office under the authority of the United States, this plan of survey was regularly registered, and a certificate obtained from the commissioners in favor of the person claiming under it. They have, therefore, for and on the part of the United States, recognized it as evidence of title, and we believe in strict conformity with the act of congress, of the 3d March, 1819, cited and relied on by both parties to this suit. The legal effect which it may have in opposition to the plaintiffs' evidence of title, will be fairly considered after its introduction. In relation to the other exception, which we think proper now to notice, *i. e.* to the permission given to the plaintiff to amend his petition by supplement; we are of opinion that the judge below did not err. It does not appear to us radically to change the demand. Actual possession when legal and peaceable, is sufficient to maintain an action of tresspass. In the pre-

East'n. District. *January* 1826.

LITCHWORTH & AL. *vs.* BARTELLS & AL.

sent case, the supplemental petition sets forth the manner of possession and title, under which the plaintiffs hold, this cannot fairly be considered as a change in the substance of the demand.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered and decreed, that the cause be sent back to the court below for a new trial, with instructions to the judge *a quo* to admit in evidence the plat or plan of survey, offered by the defendants, and that the appellees pay the costs of this appeal.

Ripley & Conrad for the plaintiffs, *Hennen* for the defendants.

LE BRETON vs. *MORGAN.*

APPEAL from the court of the parish and city of New Orleans.

A law imposing a tax on a particular parish; the object of which, is the payment of a debt due by the

PORTER, J. delivered the opinion of the court. This suit commenced by an application for an injunction to prohibit the defendant, sheriff of the parish of New-Orleans, from sel-

ling a slave of the plaintiffs, which he had seized for the payment of taxes, alleged to be due to the state.

As the petition not only states the facts on which this application was made, but contains, in a condensed form, the strongest grounds by which it was supported on the argument, we deem it proper to set it out as written.

state, is not unconstitutional.

The judiciary possess the power to declare laws contrary to the constitution void.

"Your petitioner represents, that part of the taxes: viz. The additional tax imposed by the treasurer of the state, on the inhabitants of the parish of Orleans, by virtue of and in compliance with an act, entitled "An act to grant relief to Lucy B. Holland, widow of Francis Holland, deceased," passed on the 18th March, 1820, has been imposed on the said parish to procure the reimbursement of certain expenses, incurred by the governor of the state for certain works, which, without any authority to that effect, he had ordered to be done, to stop a crevasse which had broken in, on the plantation of Barthelemy Macarty, in the said parish, in the spring of the year, 1816; which work, independant of being ordered by a person who was not invested by law with any power to that pur-

East'n. District. *January* 1826.

LE BRETON vs. MORGAN.

pose, was ill judged, extravagant and turned to be of no utility to the parish; that the law thus awarding the payment of such expenses, to be made by a particular portion of the community is an *expost facto* law, and an incroachment upon the rights of another branch of the government: viz. the judiciary whose province it was to decide if the individual who had, without any authorization, incurred these expenses was entitled to a reimbursement of them, and if so, by whom that reimbursement was to be made: that consequently, the said law is unconstitutional, and not obligatory upon the citizens."

The counsel for the plaintiff, on the argument of the cause, went at some length into the question, whether this court had the power to pronounce an act of the legislature, unconstitutional. Were the question doubtful, the authorities he read might well be considered as settling it; but any reference to them, to support the position assumed, was unnecessary in this court. It is a subject on which we never had a doubt, nor have none at this moment. We have, already, more than once found it our duty, to express our convictions on this point. The right, nay,

the necessity of the judiciary exercising this power, is so inevitably the consequence of our living under a government of laws: of the constitution or form of that government being the supreme law of the land, and of that constitution containing an express provision, that all laws made by the legislature, contrary to it, *are null and void;* that the mere statement of the premises, carries the mind at once, to the conclusion; and we feel that it is one of those self evident propositions, which requires no aid from argument, and can receive none from authority. 3 *Mart.* 12, 352. *Vol.* 3, 472.

Conceiving it therefore clear, that an act which the constitution declares to be *null and void*, cannot have *force and effect* given to it by the judiciary, we proceed to examine, whether the enactment of which the plaintiff complains, be of that nature.

The prohibition in the constitution, against the passage of *ex post facto* laws, applies exclusively to penal, or criminal cases. Such is the construction of these words, in the constitution of the United States, antecedent to the formation of the government of Louisiana, and we have no reason to doubt they were

East'n. District. *January* 1826.

LE BRETON vs. MORGAN.

used, in their then ascertained and technical meaning, by the convention of this state. 3 *Dallas*, 386. 4 *ibid.* 14. 7 *Johnson*, 488. 1 *Blackstone's com.* 46.

The constitution of this state having affixed no limits to the exercise of the power of taxation by the legislature, it is difficult to suppose even a case, in which the exercise of that power could be considered unconstitutional, or properly become the subject of judicial interference. The only objections that can be made to acts raising revenue is their inexpediency, or injustice, and both these are exclusively for the consideration of those with whom the constitution has deposited this power. We are unable, notwithstanding the argument at the bar, to discover any strength in the position; that in the passage of this law, the legislature trenched on, and invaded the functions of the judiciary. Had, indeed, the legislature declared *that according to the laws in force*, A. B. or C. should pay the individual by whom these services were rendered, another question would have been presented for our consideration. But this is what they have not done. They have passed a law in the exercise of a power which is exclusively

theirs, to raise a revenue out of which he shall be paid, and the circumstance of there not being any previous law which would authorise this payment, can furnish no ground to declare it unconstitutional. If it did, the same objection would apply to every act of the general assembly to raise money for the discharge of any just claim on the government. The legislature had as much right to direct that the money to be paid this individual, should be raised by a new tax, as they had to order the payment out of any monies unappropriated in the treasury; and they had the same right to order it to be paid by a tax on the parish of New-Orleans, as they had to levy it off the whole state; for there is nothing in the constitution which declares that taxation must be uniform. If the *motives*, which induced the legislature to pass laws of this kind, were sufficient to render them unconstitutional, there is scarcely one of their acts to raise money, that would not be void. These motives are not always avowed, but we know, in point of fact, that taxation is as often resorted to, to pay those to whom the state is indebted, or whom it may desire to remunerate for services rendered, as to create a fund out

East'n. District. *January* 1826.

LE BRETON vs. MORGAN.

of which future obligations are to be discharged. In all these cases it might be said, with the same truth and force as in the present: go to the judiciary if there be any law to pay you; and if there is not, the legislature cannot come to your relief, because in doing so, they decide that the whole, or a part of the state must pay. The legislature certainly exercise *their judgment*, in deciding what taxes shall be levied, by whom they shall be paid, and how they shall be applied, but they touch not the authority of the judiciary in doing so. All these powers are by the constitution exclusively, and wisely, confided to the representatives of the people.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Derbigny for the plaintiff, *Preston* for the defendant.

NOLAN vs. *ROGERS.*

East'n. District. *January* 1826.

NOLAN vs. ROGERS.

The receipt of an attorney at law for money received on a claim put into his hands for collection, is binding on his client; but he cannot take his own note in payment.

APPEAL from the court of the fourth district.

MATHEWS, J., delivered the opinion of the court. This appeal is taken from a decision of the court below, by which an injunction was made perpetual against the defendant, prohibiting him from issuing execution on a judgment, obtained in a previous suit by him against the present plaintiff.

The allegation in the petition, on which the injunction was granted and rendered perpetual, is payment after judgment made to the attorney of the plaintiff in the first suit.

The evidence of the case shows, that the attorney did receive in discharge of the judgment, 207 dollars in his own note, and 100 in a check on the United States' Branch Bank in New-Orleans.

On these facts, two questions of law are raised for solution. 1st. Is payment made to the attorney at law, after judgment obtained, good against the creditor? 2d. If an attorney be legally authorised to receive payment for his client, ought the receipt of any thing, except money, or such things as are ordinarily

East'n. District. *January* 1826.

NOLAN vs. ROGERS.

used in the place of it, to be binding on the latter?

As to the first of these questions, we are of opinion that the usage which has uniformly prevailed among attorneys at law, to collect money for a certain per centage, either by receiving it for their clients, before suit commenced or after judgment, is tolerated by the laws of the state, which prescribe their duties, and establish their rights and privileges, and that their receipts and acquittances are binding on the persons who may have employed them. But this authority, thus derived from usage and the law, ought not to be extended beyond the simple receipt of money, or things, which are ordinarily taken in payment of debts, such as bank notes of a bank in good credit, and checks on similar banks. There is something of impropriety on the part of a debtor who attempts to induce an attorney at law to receive for his client, in payment, any thing but money, as that is the only medium by which payments of debts, strictly speaking can be made; to discharge them in any other way must be done by a kind of barter, which is not within the scope of the legal power of licensed attorneys.

We are therefore of opinion, that the judgment of the court below is erroneous, so far as it enjoins the defendant from proceeding to levy by execution, on his former judgment, the sum of 207 dollars, which his attorney received in his own note.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered and decreed, that Rogers, the defendant and appellant in the present suit, be allowed to issue execution on his former judgment, so as to effect payment and satisfaction thereof, to the amount of two hundred and seven dollars; and that the appellee pay the costs of this appeal.

Preston for the plaintiff, *Duncan* for the defendant.

MONTAMAT AND WIFE, vs. *DEBON*.

APPEAL from the court of the first district.

Simulation may be given in evidence, on the general issue, if not objected to. The counter letter of a minor

MARTIN, J., delivered the opinion of the court. The plaintiffs allege, that Cottin, during his marriage with the present Mrs. Montamat, made a donation to her of a house and

East'n. District, *January* 1826.

MONTAMAT & AL. *vs.* DEBON.

is binding when it makes a part of the *res gesta*.

lot, and at his death, the defendant, his executor and her father, possessed himself of them, as she believed, to administer them for her, and has ever since possessed and retained them, without right; farther, that besides she has an interest in them, as common in goods with her late husband, as they were purchased during the coverture. The petition concludes with a prayer for the possession and fruits.

The defendant pleaded the general issue, and, in an amended answer, title in himself, under Cottin, senior, and the reducibility of the donation. Cottin, senior, having died, the defendant cited his heirs in warranty; they pleaded the reducibility of the donation, its simulation, the want of its registry, and the assent of the plaintiffs to the sale to the defendant.

There was judgment against the plaintiffs, and they appealed.

The facts of the case are the following: Cottin brought in marriage $30,000, and his wife her rights on the successions of her parents. Very soon after, he bought the premises for $10,000, in cash, and eighteen months afterwards, he executed a notarial instrument,

in which he declared, that on his marriage, circumstances and the state of his affairs, did not allow him to acknowledge a dowry to her; but now being able to do so, he made her, in the best possible form, a donation, *inter vivos*, absolute and irrevocable of the premises, with warranty, &c. that the donation was to stand in lieu of a dowry, with privilege, &c. The act was not recorded in the office of the recorder of mortgages.

The act being a simulated one, she gave him a counter title, which he kept, and was returned to her after his death.

He instituted the child with which she was pregnant, his only heir, and her, in case the child proved an abortive one, his only heiress, with the obligation, in case his father survived him, to pay his *legitime*. He appointed the defendant his executor, and died; so did the child a few hours after his birth.

She claimed the estate, as heiress to his son, and in the inventory the premises were put down as part of the estate; she protested against it.

Cottin, the father, sued her for his *legitime*, and after the *contestatio litis*, she married Montamat. Judgment was given for her, but

East'n. District. *January* 1826.

MONTAMAT & AL. vs. DEBON.

this court reversed it, declared the child an abortive one, and decreed the legitime to Cottin.

On her second marriage, she constituted to herself in dowry, the premises and the slaves, and other property in the inventory of the testator's estate.

The defendant kept possession of the premises till the judgment of this court, but the plaintiffs received the rents till they were sold, by Cottin, senior, and him acting as executor, although the years of his executorship had long before expired. The usual publications were made, and no opposition was made by the plaintiffs.

Cottin being still unpaid, sued the parties to the present suit, alleging the present defendant detained the premises, having bought them at the auction for $25,000. Neither he, nor the present plaintiff, though duly cited, answered; judgment by default was taken, and confirmed, the present defendant was directed to file his account. The suit was put an end to, by a transaction between Cottin and the defendant, after a reference, and without any objection of the plaintiffs to the account of the executor, who after payment of

$17,000 to Cottin, received his discharge, and a subrogation to all Cottin's rights in the estate. He was farther to be indemnified by Cottin, against the claim of one Lecesne, of Paris, on the estate, and security was given him therefor.

He has ever since remained in possession of the premises.

1st. The plaintiffs and apppellants urge in this court that the heirs of Cottin, senior, could not legally be called in warranty.

2d. If they could, it was done too late, or they could make no change in the pleadings.

On the merits they contend that,

1st. The heirs could not avail themselves of the want of registry.

2d. The manifest intention of the donor to constitute a dowry, does not prevent the conveyance being available as a dowry.

3d. The simulation is not proved.

4th. The wife being a minor could not give a contre letter.

5th. Her assent to the sale, to the defendant, is not proved.

6th. If proven, it could not sanction the disposal of a dotal estate.

East'n. District. January 1826.

MONTAMAT & AL. vs. DEBON.

7th. The reducibility of the donation cannot be urged, till the state of the succession be known, after its liquidation.

The third and fourth propositions have attracted our attention first, because if the act was a simulated one, it was no act, and there was no donation.

The objection to the call of the heirs in warranty, if there be no donation, needs not to be examined. It is true, they alone pleaded the simulation, but we are of opinion, that a simulated act, being no act, the simulation, establishing that there is no act, may be given in evidence under the general issue, especially if the evidence be not objected to; perhaps, the objection to the evidence would authorise a new trial, only, if the party avered he was taken by surprise.

The simulation wethink clearly results from the testimony of Gurley and Guillot. They were the sons-in-law of the defendant's wife only; and according to the decision of this court, in the case of *Bernard & al.* vs. *Vignaud*, a father and son-in-law, do not stand in the relation of ascendants and descendants. The wife's contre letter, though she be a minor, can bind her as a part of the *res gesta*.

East'n District. *January*, 1826.

MONTAMAT & AL. vs. DEBON.

As the plaintiffs could not sell the dotal estate, it could not pass by a tacit consent.

There being no donation, the title of the plaintiffs rests only the right on the premises on an acquisition made during marriage. Cottin brought $30,000 in marriage, a few weeks after he purchased the premises. His wife did not bring a cent; the presumption is very strong that he bought with the money he brought in. Still she may have a claim on the premises as part of the *gananciales*, but of this there is no evidence, for the estate is unliquidated.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Derbigny for the plaintiffs, *Mazureau* for the defendant.

East'n. District.
January, 1826.

BALFOUR
vs.
CHEW.

BALFOUR vs. *CHEW.*

APPEAL from the court of the third district.

PORTER, J., delivered the opinion of the court.—The proceedings in this case have arisen out of an order of seizure and sale, obtained by the defendant, Chew, against Balfour. The latter applied for an injunction, which was granted; and on hearing, made perpetual. The defendant appealed.

The principal ground on which the prayer for an injunction rested, was a previous sale of the plaintiff's property, under a former order of seizure and sale. The purchaser at that sale, conceiving his rights to be affected by the matters at issue between the plaintiff and defendant, asked and obtained leave to intervene; and the judgment being as unfavorable to his pretensions as that of the defendant, he also appealed.

The case comes up on two records, but they have been argued together in this court, and they do not appear to require a separate consideration.

To set out at length the various documents introduced in evidence on the trial below,

Parol evidence cannot be received from a purchaser at sheriff's sale, to show the property was worth less than the conveyance expresses he was to give for it.

A promise to release a mortgage, is not a release of it.

Unless property sold by a sheriff brings more than the amount of the previous mortgages, there is no sale.

A bid at a sheriff's sale, is a bid for the absolute value, and when it is incumbered, is not a bid over and above the incumbrances.

But this bid may be made for the entire value, with the obligation to pay the mortgage; or for the value above the mortgage, subject to the prior incumbrance.

Selling the land as subject to a mortgage, does

would impede, rather than promote, a clear understanding of the case.

In the month of November, 1820, the plaintiff in injunction, (Balfour) purchased of the defendant a tract of land for the sum of $10,800, payable in three instalments, and gave his notes, with mortgage, to secure the purchase money.

not make the purchaser personally liable.

At the time the sale was made, the land was subject to a mortgage in favor of one Charles G. Johnson, who had sold the premises to the person from whom the defendant purchased it. Johnson became a party to the act between plaintiff and defendant; and declared, that on Balfour's payment to Chew of the purchase money, he, Johnson, would release and cancel his mortgage.

Partial payments were made in pursuance of this contract, but Balfour being unable to fully comply with it, came under another obligation to Chew, on the 24th of April, 1823, by which he acknowledged to owe $5,116: viz. $1,866 for balance of the first instalment, and $3,240 for the second. For these sums he gave his notes, and an additional mortgage on seven negroes.

These notes were transferred to William G.

East'n. District. *January*, 1826.

B LFOUR Avs. CHEW.

Johnson, by blank indorsement, and the application for an order of seizure and sale, was made by Chew, for the use of the transferee.

The execution which the court has enjoined, is the second execution issued on this mortgage. The proceedings which took place on the first, are the source of all the difficulties the cause presents. The plaintiff insists that in consequence of that sale, he is entitled to a credit of $9,450; the defendant contends it is only $3,450.

This difference of $6,000 in the pretensions of the parties, arises from the land being sold subject to a mortgage for $6,000, for which the defendant Chew, the vendor, was responsible, he having conveyed with warranty. The plaintiff asserts, that as his property sold for that amount less than it would have done had the mortgage not existed, he is entitled to set it up against any balance that may be due to his vendor.

If the facts should be found such as he has alleged, and the legal consequences he deduces from the sale, are correct to the extent relied on, we have no doubt of his right to offer the claim against any other the defendant may have against him; and that the plaintiff in

execution, has no right to proceed to make money on a judgment, which would have been satisfied at the first forced sale under it, had it not been for an existing incumbrance for which he was responsible.

The petition sets out the circumstances in detail, of which a condensed statement has been just given.

The answer of the defendant avers:

That taking the facts as true, the plaintiff has not shown any equity;

That Balfour, at the time he made the purchase, was informed of the mortgage in favor of Johnson, and that Johnson joined in the sale, and agreed to cancel the mortgage, on the plaintiff paying the sum of $10,480, which he has failed to do;

And, that the facts alleged are untrue.

The petition of the interpleader Chinn states,

That he was the purchaser at sheriff's sale, and that the allegations in the petition would subject him to the payment of a large sum of money above the amount which he conceived he was giving for the property;

That at the time of the sale, William G. Johnson had obtained by transfer, and was the

East'n. District. January 1826.

BALFOUR vs. CHEW.

real owner of the mortgage debt of Charles G. Johnson and of E. R. Chew, and the money collected was to be applied to extinguish the original debt due to Charles G. Johnson; that this was well known to Balfour.

That the bid of the petitioner was the absolute value of the property, and was so considered by all parties, and not for the surplus value, over and above the amount of the first mortgage.

That the amount of the petitioner's bond was improperly applied to the junior mortgage, and that being given in error, it should be cancelled, or imputed to the first mortgage.

That the petitioner has become holder and owner of all the mortgages, since the filing the petition of injunction, and is entitled to receive their proceeds.

The first question necessary to be examined, is the correctness of the opinion of the court below, refusing to hear parol testimony that the land was worth no more than the sum at which the intervener stated he bought it.

If this proof would have shown the price to be different from that which the written evidence establishes, it was illegal; if the same, it was unnecessary. No ground has been pre-

sented for a departure in this instance from the general rule, except an averment that there *was error*, or in other words, that the parol evidence would prove the transaction to be different, from that which it is shown to be by the written. Now it is obvious, that if the mere allegation, that the facts are different from those which the written documents import, be sufficient to authorise the introduction of inferior testimony, the rule ceases to have any effect; for that allegation could be made in every case, and of necessity must be made in all, or it would be idle to contradict the written proof. But it was to guard against the danger of admitting such evidence, on such allegations, that, we understand, was the reason which induced the legislature to prohibit this species of proof.

It is contended, both by the defendant and interpleader, that the mortgage for $6,000, which the plaintiff in injunction insists his land was sold subject to, did not exist; that it was merged in that given by the latter when he sold his land, and consequently he is not entitled to credit for it against the defendant.

The correctness of this position will be best ascertained, by a reference to the instru-

East'n. District. *January* 1826.

BALFOUR vs. CHEW.

ment by which this merger is said to be produced.

It is the deed of conveyance by which the defendant sold to the plaintiff the land which was the consideration of the debt sued on. Charles G. Johnson, who then held the mortgage now alleged to be merged, became a party to this act and stipulated, "that so soon as the said William Balfour *shall have paid* unto the said Edward R. Chew the said purchase money, ($10,480) secured by said mortgage, the said Charles G. Johnson *will exonerate and release* a mortgage he has upon the said land." It is conceived unnecessary to go into any argument to show, that a promise to release a mortgage *so soon as a sum of money is paid*, is not a release *until that money is paid.* Far from the instrument proving a merger of the previous lien, it establishes the mortgagee retained it, until the second should be discharged.

The most important question in the case, is the effect of the sale by the sheriff.

The conveyance of that officer, after reciting the authority under which he acted, and describing the premises sold, states: "that having exposed the same at public sale, according

to law, on a credit of twelve months, and subject to a balance of a mortgage given by Samuel Chew, in favor of Charles G. Johnson, dated the 7th November, 1818, for $6,000, as appears by the certificate of the parish judge, dated the 17th May, 1824, and annexed to the order of seizure, Thomas W. Chinn became the purchaser thereof, for the price and sum of $3,450 for which he gave bond and security according to law." In conformity with this deed, is the bond of the purchaser who interpleads, and it is payable to the seizing creditor.

In opposition to the apparent legal effect of these two instruments, it is contended, that notwithstanding the language used in them, the sale was for the benefit of the previous mortgage, and that the amount of the money made should be credited on it.

This conclusion is obtained from an argument which rests on the following postulates:

"That a bid at sheriff's sale is a bid for the absolute value of the property, and when it is incumbered, is not a bid over and above incumbrances.

"That at a sale by execution, of property subject to prior incumbrances, where the bid does not amount to the debt due on the prior

East'n. District. *January* 1826.

BALFOUR vs. CHEW.

incumbrance, it is yet an absolute sale, and vests the title in the highest bidder."

The second of these grounds has been already examined, and considered untenable by this court, in the case of *De Armas* vs. *Morgan*; the reasons on which we came to the conclusion there expressed: that there was no sale unless the property brought more than the sum for which it was previously mortgaged, appears to us, on re-examination, correct; and we therefore pass to the consideration of the other and more important question. *Vol.* 3, 604.

The proposition contained in the first ground we take to be correct: we think the act of 1817, by enacting, that the purchaser shall be personally liable for the amount of the previous mortgage, evidently contemplates the whole property should be sold, and the inconveniences which would attend the other interpretation, fortifies the construction which is fairly drawn from the expressions used in the law. But although such, in our opinion, is the true meaning of the provisions on this subject, a question of infinitely more importance in the decision of this cause arises,

and that is, how must this bid be made? must it be for the entire value, with the obligation to pay the previous mortgage out of it? or will it be sufficient for the buyer to bid the value over and above the mortgage, subject to its payment? we think either mode will meet the requisition of the act. The statute provides, "that the sheriff or other public officer making the sale, shall only receive from the purchaser the surplus for which the property shall have been sold, over and above the amount of the special mortgage." On bidding the whole amount then, no money is paid but that which remains after satisfying the mortgage: in bidding the surplus over the mortgage, and with the obligation to discharge it, he only makes the deduction before the sale, which he would and must make after. Any other construction, it appears to us, would be substituting words for things. There is no real difference between buying a thing for $3,450, to be paid the seizing creditor, with an obligation to discharge a previous mortgage for $6,000, or purchasing it for $9,450, $6,000 of which is to be retained to discharge that mortgage, and the balance to be paid the creditor at whose instance the sale is made.

East'n. District. *January* 1826.

BALFOUR vs. CHEW.

The sum to be paid is the same; the time of payment is the same; the persons to whom the money is to be paid the same; and the law in pronouncing on the validity of the contract must be the same, unless it overlooked facts in pursuit of verbal distinctions.

If the facts of this case brought the interpleader within the principles just laid down, we are satisfied, after much consideration, it would be our duty to hold him to the bargain, no matter how severely it might affect him; but on examining the evidence, we find they do not. Our opinion, that a bid for the surplus above the mortgage, with an obligation to discharge the incumbrance, is the same thing as a bid for the whole amount, deducting the mortgage, is based upon the idea, that in the first mode the buyer comes under the same personal obligation to discharge the mortgage, that he would had he bought in the latter. The evidence, however, furnished by the sheriff's return, and his deed of conveyance excludes this idea. The statute says, the property shall be sold subject to *the payment, by the purchaser*, of the previous mortgages or privileges. The return of the officer states, *the land was sold subject to the mortgage;* the

deed uses the same expressions, and neither makes mention it was sold subject to the payment by the purchaser. This distinction, which at first blush appears to partake of the nature of those verbal ones we have this moment reprobated, will appear, on a close examination, to be material, and change entirely the nature of the act. If the purchaser became personally responsible for the mortgage debt, the amount of this engagement would make a part of the sum he was to pay for the land, and consequently his bid be for the absolute value. But when the land alone is made liable, there is no personal obligation on the purchaser beyond that which he promises to pay the seizing creditor; hence the bid can be viewed in no other light than one for the surplus value, and so considered, we do not think it such an one as the law sanctions or permits.

As the defendant has been deprived by the peculiar circumstances attending this case, of offering his land to satisfy the second order of seizure and sale, we think justice requires, the plaintiff should be enjoined from selling the negroes, until the defendant can exercise the right which the law confers on him, of

East'n. District. *January* 1826.

BALFOUR vs CHEW.

pointing out what portion of his property he wishes to give up, to satisfy the execution.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed: and it is further ordered, adjudged and decreed, that the sale and all proceeding which were had on the first order of seizure, be set aside and declared null and void; that the bond of the purchaser, T. W. Chinn, be cancelled, and all parties be restored to the situation in which they were at the time of granting the first order of seizure and sale: it is further ordered, adjudged and decreed, that the second order of seizure and sale, and all proceedings under it, be set aside, reserving to the mortgagee's creditor the right to inforce his claims according to law; that the defendant, Chew, and the interpleader, Chinn, pay the costs of the court of the first instance, and the appellee those of appeal.

Ripley & Conrad for the plaintiff, *Woodroff, Watts and Lobdell*, for defendant.

East'n. District. *January* 1826.

GALLOWAY vs. LEGAN.

In an alternative obligation, the choice is with the party promising.

If the services of a slave, given for the use of money, exceed the legal rate of interest, the contract is usurious.

GALLOWAY vs. LEGAN.

APPEAL from the court of the eighth district.

MATHEWS, J., delivered the opinion of the court. This suit is brought by the curatrix of the estate of P. Galloway, to recover a certain negro woman slave described in her petition, as belonging to the succession of the intestate, and also to obtain from the defendant the value of the services of said slave for the time he has had her in his possession.—Against these claims and pretensions on the part of the plaintiff, he sets up a right to hold the negro and enjoy her services free of any remuneration or hire, on account of the sum of 180 dollars which he lent to the intestate during his life time, and that he is not bound to deliver her over to the owner, until full payment to him of that amount. The cause was submitted to a jury in the court below, who found a verdict for the defendant, and judgment being rendered thereon, the plaintiff appealed.

Two bills of exception appear on the record. 1st. To the opinion of the judge *a quo* by which he refused to admit in evidence a

East'n District. January 1826.

GALLOWAY vs. LEGAN.

receipt given by the defendant for twelve dollars, to the plaintiff, wherein he promised to credit that amount on a mortgage which he had on the property of P. Galloway, or pay it to the person from whom he received it. 2d. To the charge of the judge to the jury, in which he instructed them, that they might consider the services of the slave mortgaged, as having been estimated by the parties to the contract, to be worth no more than the legal interest of the money lent.

In rejecting the receipt offered to prove payment of the sum specified therein, on the mortgage, we are of opinion, that the judge did not err. The instrument creates, on the part of the receiver of the money, an alternative obligation, in the discharge of which, he has the choice of means, either by crediting the amount on the mortgage of the intestate, or refunding it to the curatrix. To force him in this suit to give credit on the former contract, would deprive him of the choice which he has of right on the last agreement.—See *Pothier on Obligations, nos.* 244 *and* 247.

We think the judge erred in his charge to the jury, if he meant to convey to them the idea that the estimate made by the

parties to the contract of mortgage of an equality of value, subsisting between the use of the money and the services of the slave, formed so completely and exclusively a rule for its interpretation, as to exclude the application of the laws, or municipal regulations of the community; and that the jury understood the charge in this manner can scarcely be doubted, if their verdict be viewed under a comparison with the cause and legal effects of the contract. Should borrowers of money, be considered so conclusively bound by any estimate which might appear in contracts of loan of the value of the services of slaves, or hire of other property delivered to the lender in compensation of interest, and as a security for the principal debt, the existing laws on the subject of usury, might become wholly inefficient for the purposes of their institution, viz. the protection of the unfortunate, against the griping avarice and unfeeling selfishness of lenders on usury.

According to our laws, all contracts, the intention of which is to secure to lenders of money more than legal interest, or such as may be lawfully taken by agreement, are void.

East'n. District. *January* 1820.

GALLOWAY vs. LEGAN.

Whether that, relied on by the defendant in the present case, be or be not one of those illegal contracts, depends on the real value of the services of the slave which was placed in his possession by the intestate, and has so remained for several years. The establishment of this fact was a fair subject for the introduction of testimonial proof in the court below. Many witnesses were introduced, who varied in their opinions of the value of the services of the slave in question, but the lowest estimate made by them, shows her services to be worth much more than the highest interest tolerated by law, on the sum borrowed by the owner. It is therefore believed, that the verdict of the jury is unsupported either by the law or evidence of the case. In support of the correctness of the present opinion, see the case of *Herman* vs. *Sprigg*, and the authorities therein cited, *Vol.* 3; and also the *Nueva Recopilacion*, *B.* 8. *tit.* 6, *law* 4.

In opposition to this doctrine, asssumed by the court, the counsel for the defendant contends, that the contract under which his client holds the slave in dispute, is not a mortgage or hypothecation, but a *vente à remeré*, or sale with the power of redemption. It is seen

that in the investigation of the cause, we have in conformity with the expressions used in the instrument by the parties, considered it a contract of mortgage; it is perhaps not such, strictly speaking, but partakes more of that species of pledge known to our laws under the denomination of antichresis. It is not a *vente à remeré*, for no clause in the act, seems to contemplate a transfer of property.

The plaintiff having demanded a jury to try the cause; and as it is a suit in which damages are claimed, this court is of opinion that the most correct judgment which can be given, under the present circumstances of the case, is to remand it for a new trial.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled, and that the cause be sent back to said court to be tried *de novo*; further the costs of the appeal to be paid by the appellee.

Hennen for the plaintiff, *Ripley & Conrad* for the defendant.

East'n District.
January, 1826.

M'MICKEN
vs.
FAIR.

M'MICKEN vs. *FAIR.*

APPEAL from the court of the third district.

A witness who testifies against his own interest is competent.

MARTIN, J., delivered the opinion of the court. The defendant is sued on an allegation that he took possession of the estates of his parents, and is liable for their debts. The plaintiff, to support the action, offered the defendant's brother, who was objected to, and the objection sustained.

The plaintiff and appellant contends the court erred, because the decision of the suit could not affect the witness.

On the success of the plaintiff, the defendant would have the recourse on the witness, which the plaintiff would have, if he failed. He is bound for his share of the debt, and the event of the suit determines only the party to whom he is to pay.

That, if the witness has any interest, it is averse to the plaintiff's, who seeks to lessen the estates of his ancestors, and reduce the distributive part he is entitled to. In such a case, this court has said the witness is to be heard. 6 *Martin*, 256. 1 *Johnson*, 159.

The greater part of the plaintiff's claim is grounded on an account alleged to have been acknowledged and signed by the mother of the defendant, and the witness.

That, admitting that he has an interest, as to certain items, the articles of which he received himself, he could not have any in proving his mother's signature at the foot of the account.

Although the witness be excluded as to the items of an account in which he is interested, he must be heard on the others. 4 *Cranch*, 62.

We have not been favored with any argument on the part of the defendant.

That of the plaintiff appears conclusive. The witness, we think, is a good one for the plaintiff; for if he have any interest, it is to defeat the claim. The judgment, if it may be given in evidence against him, must be so to his injury; it cannot protect him, if it be favorable to the plaintiff. The defendant cannot object to a witness, whose interest it is that the plaintiff should fail.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that

East'n. District. *January* 1826.

M'MICKEN vs. FAIR.

the case be remanded, with direction to the judge to admit the testimony; and it is ordered that the defendant and appellee pay costs.

Preston for the plaintiff.

CANFIELD & DIXON vs. *MAHER & AL.*

APPEAL from the court of the parish and city of New Orleans.

Insolvent's books not good evidence in an action between creditors.

A payment made on the eve of bankruptcy, out of the usual course of business, *is void.*

PORTER, J., delivered the opinion of the court. This action is brought by the syndics of an insolvent's estate, to recover the value of merchandise sold by the insolvent. The petition does not state whether the sale was made before or after the failure: it concludes with a prayer for general relief.

The answer contains a general denial, and an allegation that the transaction took place in the fair course of trade.

There was judgment for the plaintiffs, for the value of the goods. The defendant appealed.

The evidence shows, that the debtor filed his petition for the surrender of his property

on the 15th of March, and that the goods were not delivered until the 11th.

There is a bill of exceptions to the opinion of the judge refusing the defendants permission to prove by the insolvent's books the correctness of the transaction. We think the judge did not err; this point has been more than once decided in this court. 3 *Mar.* 707. 12 *ibid.* 157.

There is no legal evidence on record, that these goods were paid for at the time of delivery or since; and if they were delivered in discharge of an antecedent debt, the transaction was out of the ordinary course of business, and cannot affect the rights of other creditors. This case is stronger than that of *Ritchie & al. syndics*, vs. *Sands & al. syndics*, 10 *Mar.* 704. See also 3 *Mar.* 277, *and* 4 *ib.* 625.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be affirmed with costs.

Hoffman for the plaintiffs, *Preston* for the defendants.

East'n. District. *January* 1826.

WILLIAMS vs. HOOPER.

WILLIAMS vs. HOOPER.

APPEAL from the court of the eighth district.

A record cannot be contradicted by parol.

PORTER, J., delivered the opinion of the court. This is an appeal from a decision dissolving an injunction, which had been granted on an allegation, that execution had issued against the plaintiff on a judgment rendered at the previous term, though that judgment had been set aside, and a new trial granted.

On the trial, the plaintiff offered to prove these facts by parol testimony, but the court refused to admit it to contradict the record.

We think the court did not err. The record was the best evidence of what had occurred in relation to the cause. The decisions of courts of justice are among the most important evidences of property, and there is a great necessity they should be preserved in the most authentic form. The object the legislature had in view, in directing them to be recorded, was to avoid the danger of trusting to the memories of men to prove them. That which was attempted here was still more dangerous, it was not only to establish, from the recollection of witnesses, the judgment of

the court, but to do so in contradiction to what was written. It is far better to bear with cases of individual hardship, than violate a rule, the preservation of which is so important to the best interests of society.

One of the points made by the appellant is, that the court itself should have corrected the error and amended the record. It does not appear any such application was made below, and we therefore find it unnecessary to say whether the court could legally do so, at a term subsequent to that at which the entry was made.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed with costs.

Ripley for the plaintiff.

East'n. District.
January 1826.

BOYD & AL.
vs.
HOWARD.

BOYD & AL. vs. *HOWARD.*

APPEAL from the court of the first district.

A vendor who alleges a sale at a specific price, may give evidence of the value of the objects sold.

MARTIN, J., delivered the opinion of the court. This case being remanded to the district court in January, 1825.—*Vol.* 3, 286.

Williams, a witness of the defendant, deposed, Gale, in November, 1822, bought from the plaintiffs ninety-six barrels of flour, or thereabouts, at one dollar and a quarter per barrel, and after the delivery, a bill against the schooner Hope, and owners, was sent by the plaintiffs to the defendants' store, and sent back as unintelligible. It was delivered to the defendant to be forwarded to Petterson, (considered by the defendant as the owner of the sloop) that he might forward its amount to the plaintiffs, the defendant considering he undertook it through favor, he undertook to forward the plaintiffs' bill.—Some few days, after the return of the bill, one of the plaintiffs' returned to the city, and brought another bill against the schooner and owners, and demanded payment from the defendant. The witness believes both bills were for the same supply. Some harsh con-

versation ensued, and the plaintiff told the defendant he looked to him only for payment.

On his cross examination, the witness admitted he was at the time and is still a partner of the defendant; that he knows of Gale's purchase from the plaintiffs by the bill they then rendered. One of the plaintiffs told him the flour was sold by his firm to Gale, on account of the sloop; that it was delivered to Gale and the bill sent to the defendants' store by a clerk of the plaintiffs, who did not demand payment therefor, and requested, it might be sent to Patterson, and the proceeds of the flour came to Howard & Williams' hands, at the rate of one dollar and a quarter in trade, and have been considered as the property of the sloop's owner, and accordingly credited to Patterson, who has since received them. He gave no particular receipt, but this sum was merged in their general running account.

On this examination in chief being resumed, the witness said he was informed by Gale, the proceeds of the flour had been tendered to the plantiffs, who refused receiving them, as it was out of their line and the wit-

East'n. District, *January* 1826.

BOYD & AL. *vs.* HOWARD.

ness could do better with them. He denied having any interest in the suit.

Coquet, a witness of the plaintiffs, deposed, he was their clerk, and they delivered a quantity of flour to the defendant, about ninety-six barrels, thirty or forty barrels were delivered by himself and the rest by one of the plaintiffs. The flour was then worth three dollars and fifty cents per barrel. They had no other flour to sell at the time.

He proved the signature of the plaintiffs to an account in which they charged the defendant with $312 for ninety-six barrels flour, at one dollar and twenty-five cents per barrel.

There was a verdict and judgment for that sum against the defendant, and judgment was given accordingly, after an unsuccessful effort to set aside the verdict as contrary to evidence, and he appealed.

His counsel urges in this court, that the evidence does not support the allegations in the petition, which state a sale at a fixed price.

This is nothing but a repetition of the objection overruled when the case was here last winter, when we decided that a vendor

who alleges a sale at a specific price, may, if he has no proof of the vendee's assent to the price, show it is a proper one by evidence of its being the current, although he has no count on a *quantum valebant;* besides in the present case, the defendant by the production of the plaintiffs' bill, shows that was the price they sold at.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Christy for the plaintiffs, *Morse* for the defendant.

DUPAU vs. *RICHARDSON.*

APPEAL from the court of the first district.

On a motion to dissolve an injunction which is accessory to the principal action, the merits cannot be tried.

MARTIN, J., delivered the opinion of the court. The plaintiff having sued for the possession of a plantation, which he alleged the defendant had conveyed to J. Bolton, who had transferred all their rights to the plaintiff, prayed an injunction to prevent the removal of a crop thereon; it was granted, and

East'n. District. *January*, 1826.

DUPAU vs. RICHARDSON.

on the motion of the defendant, dissolved, whereupon the plaintiff appealed.

The application was made on the allegation, that the plaintiff had no other title to the premises than a mortgage.

We are of opinion the district court erred in listening to the application. It was in fact a demurrer to the petition, and if the application to dissolve had any ground there ought to have been judgment for the defendant. The merits of the case cannot regularly be examined in this manner; the attempt is the same as that of disproving the debt on a motion to set aside the attachment.

Security must have been given to obtain the sequestration, and the proper course was to let it stand until the merits of the case were regularly acted on, when an appeal would have put an end to the contest. In the mode resorted to, we are called on to express an opinion on the merits, and then remand the case to be tried; to be brought back and re-examined again. This is quite irregular.

It is therefore ordered, adjudged, and decreed that the order to set aside the injunction be reversed the sequestration restored,

and the case remanded to be proceeded on according to law. The defendant and appellee paying costs in this court.

Pierce and Livermore for the plaintiff; *Grymes and Mazureau* for the defendant.

CUCULLU vs. *MANZENAL & AL.*

APPEAL from the court of the first district.

Partnership property may be attached in a suit against one of the members of the firm.

MATHEWS, J., delivered the opinion of the court. This suit is commenced by attachment, which seems to have been laid on property belonging jointly to the defendants and another person, in other words, on partnership property.

The court below dismissed the suit, considering that no property of the defendants had been seized under the writ, and from this order of dismissal the plaintiff appealed.

The garnishee, who was cited in the case, and answered interrogatories, states, that he had property in his possession, which he obtained by the authority, and on account, of a firm composed of Cuestra Manzenal & Toso,

East'n. District. *January* 1826.

CUCULLU *vs.* MANZENAL & AL.

of the Havana, which produced nett on sale, the sum of 960 dollars.

On this fact, a question of law arises; whether partnership property be liable to attachment for the individual and particular debts of one or more of the partners? The remedy by attachment, is out of the ordinary course of judicial proceedings, as it authorises adjudication against defendants, without personal citation or a seizure of their property; which may be considered as a means of compelling the appearance in court, of persons who cannot be reached by ordinary process. The seizure of any property, however small the amount, is sufficient to give cognizance of the cause, and authorise proceedings to final judgment. Our law extends attachments to every species of property, and all rights and credits of defendants. Each partner of a commercial firm, has a right to his portion of the partnership property, according to the terms of the association; all are possessors of a common property, and every one for himself and his co-partners. The right and interest which each individual of the society has to an undivided share of the partnership effects, may be seized and sold

under execution; and it may also, in our opinion, be seized under our attachment law.

The situation of property belonging to a corporation established by law, differs essencially from that of a mere voluntary association of men for the purpose of carrying on the ordinary affairs of life. Their common stock is the property of each and every individual, and not distinctly that of the whole body, as in case of a corporation established by law. The case in 7 *Martin*, 31, is clearly distinguishable from the present; the former related to the rights of a body corporate. This to the property of men who hold it in common it is true, but in which each is entitled to a certain share, which gives to the individual an interest which may be separated from the mass.

We are of opinion that the seizure in the present case, is sufficient to authorise proceedings in the attachment, and consequently, that the judge *a quo* erred in dismissing it.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be reversed, avoided and annulled, that the plaintiff's action be reinstated, and the cause

East'n. District. *January* 1826.

CUCULLU vs. MANZENAL & AL.

sent back to the court below, to be proceeded in according to law.

Workman for the plaintiff, *Pierce* for the defendants.

BELLIEVRE vs. *BIRD.*

APPEAL from the court of the third district.

Due diligence must be used by the holder of a bill to find out the residence of the maker, or the indorser will not be responsible.

PORTER, J., delivered the opinion of the court. The questions presented for decision in this case are, whether there was a legal demand of payment, from the maker of the notes on which this suit is brought? and if there was, if the defendant, who is indorser, had due notice thereof?

The court below thought both were established, and gave judgment for the plaintiff.

Both notes are dated at Baton Rouge, the one payable three years after date, the other four. The protests state, that the notary made diligent enquiry for the drawer at the different public places in the town, in order to demand payment, but could not find him or any person who would pay the same for his honor.

The evidence shows, that the drawer lived in New-Orleans two years and a half previous to the trial, and had continued to reside there since; that he is a tax gatherer in the city, and had occasionally been in Baton Rouge within this time, but only on a visit.

The witness by whom these facts are proved stated, that he has been only twice or thrice in New-Orleans since the drawer removed there, and that since his removal he run a schooner for some time between Baton Rouge, and the capital of the state.

Another witness proved, that previous to the maker's *removal* to New-Orleans he resided with the defendant.

We are of opinion that the demand was not legally made. It is difficult to lay down a precise rule on the subject. But in every case it is the duty of the holder to use due diligence to find out the maker. In the present case demand was neither made personally, nor at the place of the drawer's domicil previous to his removal, nor at his residence in the place to which he had removed. This we are satisfied was not sufficient. See *Bailey on Bills*, 58; 14 *Johnson*, 114; 9 *Wheaton*, 600; *Chitty on Bills*, [ed. 1821] 335.

East'n. District. *January* 1826.

BELLIEVRE *vs.* BIRD.

This opinion renders it unnecessary to decide the other ground taken by the defendant: and it is therefore ordered, adjudged, and decreed that the judgment of the district court be annulled, avoided, and reversed, and that there be judgment for defendant, as in case of nonsuit, with costs in both courts.

Ripley & Conrad for the plaintiff, *Watts and Lobdell* for the defendant.

BLANCHARD & AL. vs. *TERNANT.*

APPEAL from the court of the fourth district.

Suit for land may be brought at the domicil of the possessor.

MARTIN, J., delivered the opinion of the court. The plaintiffs claim a tract of land in the parish of West Baton Rouge, in the possession of the defendant; she pleaded several pleas, and afterwards, with leave, pleaded the want of jurisdiction of the court which sat in Pointe Coupée, her residence.

The plea to the jurisdiction was sustained, and the plaintiffs appealed.

We think the court erred. The defendant was properly sued in her own parish. *Marigny* vs. *Hunt; Skipwith & al.* vs. *Gray; Vol.* 3, 651, 655.

It is therefore ordered, adjudged, and decreed that the judgment be annulled, avoided, and reversed, the plea to the jurisdiction overruled, and the case remanded for further proceedings, and that the defendant and appellee pay costs in this court.

Hiriart for the plaintiffs; *Preston* for the defendant.

CORPORATION vs. *PAULDING.*

APPEAL from the court of the first district.

The court will not order a mandamus when no useful purpose can be attained by it.

PORTER, J., delivered the opinion of the court. This is an application for a mandamus, to the judge of the first district, directing him to set aside an order made by him and proceed to try the cause.

This order was one, which on a challenge to the array, directed the jury to be discharged, and the cause to stand continued.

We are of opinion the mandamus should not issue, as no useful purpose could be attained by it. The only objection which the judge made to try the case, was the illegality of the jury. The only direction therefore which this court could give, in case it differed with him

East'n. District. *January*, 1826.

CORPORATION *vs.* PAULDING.

in opinion, would be, notwithstanding this objection to the jury, to proceed and try the cause. But nothing could be more futile than such an order issuing from this tribunal, for the jury are already discharged, and we certainly have no means of knowing, and no right to presume, that the same challenge will be taken to the next jury, nor that if it should, the judge will give the same decision.

Let the rule be discharged.

It is ordered that the rule taken in this case, on the 25th day of December last, be discharged.

Christy, De Armas, and Moreau Lislet for the plaintiffs; *Hennen* for the defendant.

PIGEAU & AL. vs. COMMEAU.

APPEAL from the court of the parish and city of New-Orleans.

Evidence that a curator was appointed in 1813, will be admitted under an allegation that the appointment was made in 1815.

MARTIN, J., delivered the opinion of the court. The plaintiffs state that being unable to satisfy a judgment, they have obtained against their late curator, they pray that a lot he has sold to the defendant, and on which

they have a tacit mortgage, may be sold to satisfy them; they had judgment accordingly, and the defendant appealed.

The counsel urges, the judge *a quo* erred in admitting a record and a witness, to which and to whom he excepted; and in giving judgment that the defendant shall be entitled to his recourse against her vendor cited in warranty, by virtue of the judgment, instead of giving judgment against the latter for a specific sum.—*Pike* vs. *Mollere*, *vol.* 2, 472.

Latent ambiguity may be explained by parol evidence.

We are of opinion the record was properly admitted; it is that of the curator's appointment in 1815, and the objection was, that the plaintiffs had stated in their petition that he was appointed in 1813. Even in case of murder, evidence of its commission on a day different from that laid in the indictment, is received to support the charge.

The witness objected to, was offered to explain a latent ambiguity, whether a certain lot on a certain street, was the one which had been sold.

The judgment is clearly erroneous in not according judgment for a specific sum, against the warrantor, and in saving only the remedy against him.

East'n. District. *January* 1826.

PIGRAU & AL. *vs.* COMMEAU.

It is therefore ordered, that the judgment, as far as it regards the warrantor, Garcia, be annulled, avoided and reversed, and that the original defendant Commeau, have judgment against him for six hundred dollars, with costs in both courts, and that the judgment against the original defendant be affirmed with costs.

Morel for the plaintiffs, *Hoffman* for the defendant.

BALDWIN vs. *GRAY.*

APPEAL from the court of the first district.

The liability of partners on a contract made in this state, is governed by our laws, not of that, where the partnership was entered into.

A receipt to a debtor *for his part*, extinguishes the obligation *in solido*.

PORTER, J., delivered the opinion of the court. The facts in this case do not appear to be controverted, the only matter disputed is the legal obligations which arise on them.

The plaintiff was agent for the steam-boat Fayette, of which the defendant was part owner. This action is instituted to recover the amount of an appeal bond, given in an action, wherein the owners of this boat were defendants, and also for monies paid for the expenses of the boat while in this port.

It is insisted the defendant is liable *in solido*, because the contract by which he became interested in this vessel, was entered

into at Pittsburg, in the state of Pennsylvania, where the common law prevails.

This law governs the obligation of the partners with each other, but not with third persons. It can no more affect the rights of those who contract with them in a different country, than particular stipulations between the partners could. The contract entered into in the case before us, was made in this state, and must be regulated by the *lex loci contractus*.—This is the general rule, and we know of no exception to it, unless the agreement is in respect to land in an other country, or the performance is to be in another state. A foreigner coming into Louisiana, who was twenty-three years old, could not escape from a contract with one of our citizens, by averring that according to the laws of the country he left, he was not a major until he reached the age of twenty-five.

We think therefore, that the defendant is only liable for his *virile* portion of the monies laid out and expended on the steam-boat Fayette.—*Caroll* vs. *Waters*, 9 *Martin*, 500.

In relation to the appeal bond, it seems to be conceded the defendant is liable *in solido*,

East'n. District. *January* 1826.

BALDWIN *vs.* GRAY.

unless there has been a severance of the judgment.

The evidence of this it is contended, is presented by a letter of the plaintiff to the defendant, in the following words:—

New-Orleans, August 8, 1823.

Mr. J. F. GRAY,

Dear Sir—In consequence of the late judgment here against the Fayette, of which I informed you under date of the 27th ultimo, I have to request you to pay over to Wilkins M'Ilvaine & Co. immediately, $700, being your proportion of the whole amount of debt.

Your early attention to this, is respectfully solicited, because of my having drawn on them for the gross amount.

(Signed,) J. BALDWIN.

Payment of this sum was made as requested, and M'Ilvaine & Co. gave a receipt in full of "Mr. Gray's separate account with Joshua Baldwin, as furnished us as one of the owners of the steam-boat Fayette."

There can be no doubt, that the expressions used in this letter, and the receipt extinguish the obligation which the defendant owed *in solido*. When a receipt is given a co-debtor *for his part*, it is an acknowledg-

ment that he is not bound jointly and severally, it being inconsistent that a person should be debtor for a part, and debtor for the whole. *Pothier des Obligations, no.* 277. *Toullier Droit Civil Français, vol.* 6, *liv.* 3, *tit.* 3, *cap.* 4, *no.* 741. *Civil Code* 290, *art.* 111.

The language used in a subsequent letter of the defendant, by which he states, that "Mr. Anderson will pay the balance of the account, and if not, they must", has been relied on as restoring the obligation *in solido*. We think the expression can only be considered as a recognition of the previous obligation by which each were only responsible for a part, and that the parties did not contemplate a new obligation.

There is no foundation for commissions charged on monies paid on the appeal bond, and for costs.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled avoided and reversed, and it is further ordered adjudged and decreed, that the plaintiff do recover of the defendant, the sum of one hundred and eighty dollars, sixty nine cents, with interest from judicial demand,

East'n. District. *January* 1826.

BALDWIN vs. GRAY.

the costs in the court below, and that the appellant pay the costs of the appeal.

M'Caleb for the plaintiff, *Whittelsey* for the defendant.

GRAY vs. *BALDWIN.*

APPEAL from the court of the first district.

An assignment *sous seing privé* does not authorise the assignee to take out an order of seizure and sale.

The surety who pays for the principal, is not entitled to take out execution in the name of the creditor.

PORTER, J., delivered the opinion of the court. The defendant, in this case, had become surety for the plaintiff and others, on an appeal bond, and being obliged to pay the amount of the judgment, he took a receipt with subrogation, from the attorney at law of the obligee, and issued execution in his name, which was levied on property of the plaintiff.

The court of the first instance enjoined the defendant from proceeding in this way, and on hearing the parties, made the injunction perpetual. The reason assigned by the judge for this decision is, that the judicial surety, who pays either voluntarily or by virtue of an execution against him, acquires no title to use the judgment obtained against his principal so as to sue out execution upon it.

We find it unnecessary to say whether we accede to this doctrine in the whole extent;

being, at all events, satisfied that in its application to the particular instance before us, no error was committed.

The evidence of the payment is by an act *sous seing privé*, which did not become authentic by being filed in the record of the case; such an instrument does not authorise the surety to use the *via executiva*. This point was expressly decided in the case of *Gilly* vs. *Lee*, *vol.* 1, 237.

Nor did it confer any authority on the surety to take out execution, in the name of the person in whose favor the judgment had been rendered. There is no such right given by any positive provision of our law, and the exercise of it is inconsistent with those principles which define the privileges acquired by those who pay the debts of others with whom they are jointly bound. Again, it would be permitting that to be done indirectly, which could not be done directly.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed with cost.

Whittelsey for the plaintiff; *M'Caleb* for the defendant.

East'n. District.
January 1826.

MERIAM & AL. *vs.* WORSHAM & AL.

A partner who has sold out to his co-partners any debts that *may* be due to the firm, and who on the trial receives a release from the partnership, is a competent witness to prove a debt due to it.

MERIAM & AL. vs. *WORSHAM & AL.*

APPEAL from the court of the fourth district.

PORTER, J., delivered the opinion of the court. This is an action brought by partners in a steam saw-mill. At the time of the contract alleged in the petition, there was another person, viz. John Dutton, also a partner of the plaintiffs, but he withdrew from the firm before the commencement of this suit.

On the trial Dutton was offered as a witness, to prove the demand set out in the petition. His testimony was objected to, and the court having sustained the objection, the plaintiff was nonsuited.

The correctness of the opinion of the judge *a quo* is brought before us by a bill of exceptions.

The plaintiffs, in order to show the competency of the witness, offered two documents: the first establishes a release from Duncan & Meriam, to the witness, of all claims and demands growing out of, or in any manner whatever connected with the partnership; the second is from the witness to his co-partners, setting over to them his right, title,

and interest to "all claims, of what nature soever the same may be, which are or may be belonging or owing to the said firm."

We think the court below erred. We do not see what possible interest the witness had in the event of the cause. He did not become by his act, warrantor of even the existence of the claim in question, for his transfer does not set out any debt as positively existing, it conveys only such debts *as may be* belonging to the firm.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged, and decreed that the cause be remanded to the district court, with directions to the judge not to reject the witness because he was formerly a partner with the petitioners; and it is further ordered that the appellee pay the costs of this appeal.

Ripley & Conrad for the plaintiffs.

East'n. District.
January 1826.

SIMMINS, f. m. c. vs. PARKER.

SIMMINS, f. m. c. *vs.* PARKER.

Proof of emancipation by the persons who held and possessed a slave, is *prima facie* evidence, it was made by the owner.

Whether an act of sale, which acknowledges payment, is one of those acts which the law requires to be made double? *quere.* A *sous seing privé* act followed by execution is not null, though made single.

A partner cannot alienate real estate belonging to the firm, but he may sell the right of warranty against the vendor from whom the firm purchased.

Aliter if the partnership be dissolved.

The sale of a litigious right is not null and void.

The vendee's right to sue on the warranty made to him, is complete, the

APPEAL from the court of the first district.

PORTER, J., delivered the opinion of the court. The plaintiff sues for his freedom in virtue of an act of emancipation of his former owners, Levi Rose and Mary Rose, made in the state of Kentucky in the year 1804, to take effect in the year 1823.

The defendant pleaded that he had purchased the petitioner from W. & N. Wyer as a slave for life, that he did not know whether the allegations of the plaintiff were true or not, but required proof of them. And further, that he had bought of his vendors their right of warranty against a certain John Hewlitt, from whom they had purchased, and prayed that he might be cited in warranty, and condemned to pay the sum of $1,000, the price given Wyer for the slave.

Hewlitt appeared, and answered to the original petition, by a general denial of all the allegations therein contained: and further prayed, that one Greene, from whom he had bought, and John H. Holland, who had joined Greene in the sale, should be cited in

warranty, and in case they failed to sustain their title to the slave, they should be condemned to pay the respondent the sum of $1,000, with damages, interest, and costs.

moment the person to whom he sells is evicted.

Holland, thus made a party, pleaded the general issue, not only to the demand of the petitioner, but to the allegations contained in the answer of the defendant and in that of Hewlitt, so far as they went to throw the responsibility on him; and in addition to this defence, he averred that the act of emancipation was fraudulent, and that Parker, the defendant, at the time he purchased the plaintiff, knew of his claim for freedom, and therefore had lost his right to the action of warranty.

The cause was submitted to a jury in the court below, who found for the plaintiff, and assessed his value at $600.

On this verdict the court below gave judgment against the defendant, and decreed that he should recover of Wyer the sum of $600, the price paid for the slave; that Wyer recover of Hewlitt the same sum; and that Holland should pay Hewlitt $600, with costs of suit.

From this judgment Holland appealed.

East'n. District, *January* 1826.

SIMMINS, f. m. c. *vs.* PARKER.

The first question presented for our decision arises on a bill of exceptions, taken to the opinion of the judge *a quo*, admitting in evidence the act of emancipation, and the will under which the person granting it, held the plaintiff.

The act of emancipation appears to the court to have been proved by authentication, exactly pursuing the directions of the act of congress. The clerk of Mercer county certifies it is a true copy, from the record in his office. The presiding justice of the peace certifies, that the person who gives this certificate is clerk, and that it is in due form; and the clerk certifies, under the seal of office, that the presiding judge, Maccoun, has been duly commissioned and qualified. *Act of Congress*, March 1804. *Ingersoll's Digest*, (ed. 1825) 299.

The proof of the will is contended to be incomplete, because the magistrate who certifies states, that he is the eldest, not the presiding justice of the court. Admitting this objection to be valid, we are of opinion there is sufficient evidence to support the verdict without it. It is proved, by testimony to which no objection was made, that the act of emancipation was passed by the persons who

at that time held and possessed the plaintiff as a slave. If this were not sufficient to put the defendant on the proof of a better title, the will would not aid it. The same objection might still be made, that the person who bequeathed had no right to the plaintiff, and if that objection were removed, it might be renewed to the title of him from whom the testator acquired, and so on until the petitioner and his ancestors were traced to Africa; unless the laws of the country where the master resided conferred a title by prescription. We deem it sufficient to throw the *onus probandi* on the defendants in an action of this kind, that the plaintiff was emancipated by those who had him in possession as a slave. If the *fact* of emancipation, by the persons mentioned in the petition, was doubtful, and we thought the evidence had produced any effect in inducing the jury to find it, we should remand the case; but believing it could not, we consider it our duty to examine the cause on its merits, unless the second bill of exceptions be found of more weight than that just examined. *Caulker* vs. *Banks, vol.* 3, 541.

It was taken to the introduction of an act, *sous seing privé* purporting to be a sale from the

East'n. District. *January* 1826.

SIMMINS, f. m c. vs. PARKER.

attorney in fact of Wyer, and the objection made and overruled was, that it was not made double, and that no mention was made thereof in the instrument.

The bill of sale acknowledges the receipt of the purchase money, it may therefore be well doubted whether it was one of those acts which the law required to be made double. Synallagmatic contracts are those where the contracting parties reciprocally obligate themselves to each other. The buyer who pays the price and receives the object, may, perhaps, be said to come under no further obligation to the seller; and, that therefore it is sufficient if the act be single, because the purchaser alone is interested in preserving the evidence of his acquisition, and securing his right of warranty. But waving this question, and admitting the act to be such as the law requires to be made double, we have more than once decided, that this defect did not render it null; and, that although made single, it was still good as a commencement of proof in writing. On this principle the instrument offered was properly received here, for the other evidence in the cause shows the contract was executed, by the delivery of the object sold. *Toullier,*

SIMMINS, f. m. c. *vs.* PARKER.

Droit Civil Français, vol. 8, *cap.* 6, *sec.* 1, *no.* 321.

It has been contended that the act of emancipation is null and void, because the formalities directed by our law, for conferring freedom on slaves, have not been pursued; and we have been referred to repeated decisions in this court, where it has been declared, that if the law of a foreign country was not shown to us, we should decide the case on our own. If it became important, in the present instance, to enter into this question, it would be worthy of consideration if the principle invoked applied to a case of this kind. But the act of emancipation was passed previous to the enactment of our statute, and it pursued the laws of Kentucky, where the parties resided, and the instrument was recorded.

The remaining questions in the cause arise, in ascertaining the rights of the defendant; and the appellant, who is cited in warranty.

The first objection to the correctness of the judgment appealed from, is, that Parker, the defendant, cannot recover of Hewlitt, without showing that he is in the right of warranty of Wyer, to whom Hewlitt sold, and that no proof has been made of that fact.

East'n. District. *January*, 1826.

SIMMINS, f. m. c. *vs.* PARKER.

The evidence on which the defendant relies in support of it, is contained in a bill of sale made by the attorney in fact of William Wyer, one of the partners in the house of William & N. Wyer, merchants.

It is contended that this is insufficient, as one partner could not alienate real estate belonging to the firm; that the sale could have no greater effect than transferring the right which the vendor had in it.

This position is well taken. The principle was settled by this court in the case of *Pankwood* vs. *Richardson*, after as much consideration as we bestow on any case. *Vol.* 1, 290.

But on the other side it is urged that although the partner could not alienate the real estate, he might legally sell the right of warranty against the vendor from whom the firm purchased, and that this was done in the instance before us in express terms.

This would be perhaps correct, in case the partnership was in existence at the time of the sale; but it is admitted one of the partners was dead at the time the conveyance was made from the other to the defendant; and consequently the partnership was dissolved, as no stipulation has been proved to have ex-

sted between them, which would take the case out of the ordinary rule. *Civil Code*, 400, *art.* 50.

Considering it then as at an end, we think the power of the surviving partner to alienate the property belonging to it, whether moveable or immoveable, ceased with the dissolution; that the heirs of the deceased became joint owners of the common property; and that the utmost effect that can be given to a transfer, such as that before us, is to consider it as disposing of all the right which the vendor had in the thing sold. *Civil Code*, 400, *art.* 60; 11 *Martin*, 460; *Vol.* 1, 370; *Pothier*, *Contrat de Société*, *nos.* 144 *and* 155.

We therefore conclude, that only half the right of warranty of W. & N. Wyer was transferred to Parker, the defendant, and to that extent only has he a right to exercise it against Hewlitt their vendor.

It is however objected, that he cannot have an action for even that portion, because he purchased the slave *pendente lite*, with a knowledge of the suit, and that he is therefore the buyer of a litigious right, to whom the law refuses an action.

In support of this position, we have been

East'n. District. *January* 1826.

SIMMINS, f. m. c. vs. PARKER.

referred to a law of the *Partidas*, which declares the sale of a litigious right, null and of no effect. We think this law repealed by the provision of the Civil Code, which declares, that the person against whom a litigious right is transferred, may get discharged, by paying the transferree the real price of the transfer, together with interest from the date. It is said this provision may well stand with the other, that it is only conferring, in addition to the right of pleading, the nullity, the further means of getting rid of the engagement by paying the amount for which the transferree acquired it. This reasoning is much too refined to authorise its adoption by the court. In our understanding, the provision in our code is not only different from the Spanish law, but contrary to it. It is a clear recognition, by the legislature, that the act is not null, for if it were null, it could have *no effect*. But in declaring the mode of payment by which the debtor may be discharged, they admit that *it has effect*. Under any other idea the enactment was without object. *Lex neminem cogit ad vana. Part.* 3, *til.* 7, *law* 13; *Civil Code*, 368 *and* 131.

It now only remains to inquire, for what sum judgment should be given against the

different persons cited in warranty. The law declares that the buyer when evicted, has a right to claim against the seller. 1st. The restitution of the price. 2d. That of the fruits when he is obliged to return them to the owner who evicts him. 3d. The costs of the suits he has sustained; and lastly, the damages he has suffered above the price. It further provides, that in case the thing sold has risen in value, without the buyer having contributed thereto, the seller is bound to pay him the amount of said augmentation of value above the price of the sale.—*Civil Code* 354, *art.* 54 *and* 57.

In applying these principles to this case, our first enquiry is, in relation to the rights of the posessor who is evicted, against his vendor.

According to the evidence, he paid $600 for the petitioner. There is no evidence the property had increased in value at the time of eviction, consequently he is entitled to recover that sum from the person, who sold to him.

But he has not called in warranty his vendor, but in virtue of the assignment made to him, the person from whom his vendor purchased; and he contends, he is entitled to

East'n. District, *January* 1826.

SIMMINS, f. m. c. *vs.* PARKER.

recover every thing from Hewlitt, that his vendor could; that is the one half of $1000.

We think he has this right. The assignment of the warranty transferred all the right which the seller had in it. He could have recovered this sum, for the circumstance of the object having fallen in value, does not prevent the buyer recovering the price paid by him. *Civil Code* 354, *art.* 56.

The amount then which Parker should recover of Hewlitt, is one half of the right of W. & N. Wyer in a claim for $1000, that being the portion which one of the partners could legally transfer.

To what extent Hewlitt can exercise his right of warranty against Holland, the appellant, is the remaining question; and the solution of it depends, on whether the intermediate vendee can sue his vendors, before the person to whom he, the vendee, sold, has brought an action and recovered.

This subject received from us a particular examination in the case of *Goodwin's heirs*, vs. *Chesneau*. We there held the vendee's right to sue on his warranty, was complete, the moment the person to whom he sold was evicted. We refer to that case, and the authorities there

cited for the grounds of our decision on this point. *Vol.* 3, 422.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendant, and that the said plaintiff enjoy his freedom in the same manner as if born free. And it is also ordered, adjudged and decreed, that the defendant Parker do recover of Hewlitt, cited in warranty, the sum of $500; and that Hewlitt do recover of J. H. Holland, the appellant, the sum of $1000 with costs in the court below, the appellee paying those of appeal.

Preston for the plaintiff, *Hennen* for the defendant.